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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TOP VISION CABLE CO. OF KY. - - *Petitioner*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - *Respondents*

PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Petitioner, Top Vision Cable Co. of Ky., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals entered in this proceeding on September 22, 1972.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 487 Southwestern Second 283.

JURISDICTION

The date of the entry of the judgment sought to be reviewed is September 22, 1972. A timely petition for rehearing was denied on December 15, 1972, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the Federal Communications Commission, by the enactment of regulations dealing with local franchise requirements for a Cable Television Franchise, has preempted this area of the law so that the severability of a franchise fee provision from the remainder of a franchise agreement must be determined as a matter of federal law and policy rather than state law?

II. Whether the Judgment of the Kentucky Court of Appeals results in a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision here involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out verbatim as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision here involved in 47 U.S.C. §151, which is set out verbatim as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

STATEMENT OF THE CASE

The Petitioner is a corporation organized and existing under the laws of the Commonwealth of Kentucky. Since December, 1965, Petitioner has owned a franchise issued by the City of Owensboro, Kentucky, (hereinafter sometimes referred to as the "City"), which franchise entitled it to operate a cable television system within the city limits of Owensboro. Prior to the time this lawsuit was commenced, Petitioner had spent in excess of $430,000.00 in construction of such a system. Under the terms of the franchise, Petitioner was obligated to pay the City a franchise fee equal to 26% of the gross income received by Petitioner from its operation of the cable system.

On March 26, 1972, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir., 1970), the Court of Appeals for the Sixth Circuit held that municipal ordinances which impose a gross receipts tax on cable television systems are unconstitutional because such a tax constitutes a burden upon proceeds from interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

After the decision in *Wonderland Ventures, Inc.* v. *City of Sandusky, supra,* Petitioner instituted a declaratory judgment action in the United States District Court for the Western District of Kentucky, asking for a declaration that the gross receipts fee provision relative to its franchise be adjudged unconstitutional

pursuant to the rule announced by the federal circuit court in *Wonderland, supra.* Shortly thereafter, the Defendants, the Respondents herein, moved to dismiss that action due to the Court's lack of jurisdiction, basing their motion on a resolution passed after institution of the suit at a Board of Commissioner's meeting for the City of Owensboro. That resolution officially conceded the constitutional invalidity of the 26% gross receipts provision. The district court then dismissed the case for lack of jurisdiction since the sole federal issue involved there was the constitutionality of the gross receipts fee provision.

After the City's concession of the invalidity of the 26% gross receipts fee provision, the Petitioner attempted to renegotiate a franchise fee to be paid to the City for the rights granted by the franchise, but the City refused all attempts to enter into such negotiations. The City took the position that, nothwithstanding a clear-cut severability clause in the franchise agreement, the invalidity of the fee provision invalidated the entire Franchise Agreement (Appendix, pp. 27-34), and therefore the Petitioner no longer had a franchise to exercise. The present action was originally filed in the Daviess Circuit Court by the Petitioner on December 19, 1970, with the Petitioner asking that the court rule, in part, that the invalidity of the franchise fee provision did not invalidate the entire Franchise Agreement, and thereby deprive it of its franchise. In addition, the Petitioner asked the Court to direct the City to renegotiate the franchise fee provision so that Petitioner could move forward and exercise its franchise.

On April 6, 1971, the trial court, relying in part upon the clear-cut severability clause in the Franchise Agreement, ruled that the Franchise Agreement remained valid and enforceable despite the unconstitutional fee provision, and ordered the City to renegotiate that fee provision based upon the burdens imposed or likely to be imposed by the CATV system upon the public ways of the City (Appendix, p. 15). The Respondent appealed from the decision of the Daviess Circuit Court, and the Kentucky Court of Appeals, in a ruling issued on September 22, 1972, in which the severability clause is ignored, held that the entire Franchise Agreement was void due to the invalidity of the gross receipts fee provision (Appendix, pp. 16-26).

Prior to the date of the decision by the Kentucky Court of Appeals, but subsequent to the time the case had been submitted on briefs to that Court, the Federal Communications Commission issued detailed regulations pertaining to franchise fees paid by franchisees to a municipality for a cable television franchise. As of March 31, 1972, the FCC rule provided that

> The franchise fee must be reasonable (e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). *P & F Radio Reg.* ¶85.31 (March 31, 1972).

In its Petition for Rehearing, filed with the Kentucky Court of Appeals on October 20, 1972, (Appendix, pp. 41-50) the Petitioner argued that by these rules

the Federal Communications Commission had preempted the area relating to franchise fees and CATV franchises, and that as a result the question of the validity or invalidity of the Franchise Agreement must be decided by looking to the federal law, federal regulations, and federal policy rather than state common law. In addition, Petitioner noted the Kentucky court's failure to face the issue of the severability clause and requested that the Kentucky court squarely pass on this issue.

On December 15, 1972, the Court of Appeals, without issuing an opinion, overruled the Petitioner's Petition for Rehearing.

ARGUMENT

I. The Federal Communications Commission, by the Enactment of Regulations Dealing With Local Franchise Requirements for a Cable Television Franchise, Has Preempted This Area of the Law so That the Severability of a Franchise Fee Provision From the Remainder of a Franchise Agreement Must Be Determined as a Matter of Federal Law and Policy Rather Than State Law.

It is accepted that the Federal Communications Commission (hereinafter referred to as "Commission") has the authority pursuant to the Communications Act of 1934, 47 U.S.C. §151, to fully and completely regulate cable television, *United States* v. *Southwestern Cable Co.,* 392 U. S. 157 (1968), and that such regulation is necessary and desirable considering the impact that cable television has had and will continue to have on the national communications network.

> CATV systems, formerly no more than local auxiliaries to broadcasting, promised for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas through the country. *United States* v. *Southwestern Cable Co., supra.* at 164.

Since 1960, the Commission has responded to the increasing national importance of cable television by gradually asserting its jurisdiction over the operation of such systems. *Id.* at 165. In February, 1972, the Commission further extended its jurisdiction in this area by adopting extensive rules regarding the issuance of cable television franchises and the operation of these cable systems. *See* CABLE TELEVISION REPORT AND ORDER, 24 RR 2d 1506 (February 2, 1972). The rules became effective as of March 31, 1972.

In its REPORT, the Commission voiced increased concern over the large local franchise fees being paid by certain cable systems, and the burden such fees place upon the ability of a cable television system to provide efficient and inexpensive service to its customers, to the ultimate detriment of the national communications policy.

> The ultimate effect of any revenue raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable

> to carry out its part in our national communications policy. CABLE TELEVISION REPORT AND ORDER, *supra,* at 1578.

As the result of these concerns, the Commission ruled that the "maximum franchise fees should be between 3 and 5% of gross subscriber revenues." *CATV Rules,* 24 RR 1501, 1506 (1972).

In addition to enacting the rule regarding maximum franchise fees, the Commission also adopted other rules relating to the type and nature of a franchise to be granted a cable television system. For example, the Commission established time tables for the construction and operation of cable systems, *CATV Rules,* 24 RR at 1505, and ruled that reasonable limits must be placed on the duration of franchises, which in most cases are not to exceed fifteen years. *Id.* The Commission also established rules regarding the minimum channel capacity, *Id.,* access to channels, *Id.,* and many other matters related to requirements under local franchise agreements. It is interesting to note that the Commission expressly provided that there were certain issues related to cable television which were to remain within the jurisdiction of the state. Thus, the Commission ruled that "(d)elineation of franchise areas is a matter for local authorities to be exercised on a nondiscriminatory basis." *Id.* In the same manner, the Commission gave to local authorities the power to regulate subscriber rates. *Id.* In essence, it seems clear that by the adoption of this comprehensive scheme for the regulation of cable television the Commission has totally preempted the state of any authority to

dictate franchise provisions or standards, with the exception of those areas expressly left to the state or local body.

With the federal government, through the Commission, having occupied this area, questions relating to the continuing validity of a franchise and the severability of a franchise fee provision from the remainder of the Franchise Agreement in particular, must be governed by uniform federal rules rather than state common law or state statutes. *See, Western Union Telegraph Co.* v. *Speight,* 254 U. S. 17 (1920); *O'Brien* v. *Western Union Telegraph Co.,* 113 F. 2d 539, 541 (1st Cir., 1940); cf. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957).

The Commission has attempted to provide for a uniform system of regulation and control of cable television for the benefit of the public. If the decision of the Kentucky Court of Appeals in the instant case is allowed to stand, it will mean that Kentucky courts have the authority to disregard federal policy and federal efforts to provide uniform standards for cable television and federal efforts to establish a national communications system. The Kentucky Court of Appeals did not consider the Commission's CATV Rules, effective prior to the date of its decision in the instant case, nor did it make any attempt to consider federal policy in its decision. That Court's judgment amounts to a decision that the attempt by the FCC to regulate cable television will result in the invalidation of every franchise agreement in Kentucky where the franchise provisions are not in conformity with the Commission's rules.

The FCC's purpose to be served by the enactment of these rules and regulations was to "open up Cable's potential to serve the public," *Proposals for Regulation of Cable Television Submitted to Congress by the Federal Communications Commission* (August 5, 1971), not to invalidate all franchises which do not conform to the rules. The FCC reemphasized this purpose in a Letter Ruling, dated August 22, 1972, entitled "Franchise Provisions at Variance with FCC Cable Television Rules" (Appendix, pp. 35-39) in which it stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

The Franchise Agreement in question here has such a severability clause, yet the Kentucky Court of Appeal's decision disregarded not only the clause, but the federal purpose to be served by such a clause.

In sum, what we have here is a train of events which, if undisturbed by this Court, could pose the invalidity of franchise agreements throughout the country. As set forth above, the national policy concerning franchise fees resulting from the adoption by the Commission of CATV Rules is that all franchise fees established by local grantors of CATV franchises should not exceed the range of 3% to 5% of gross receipts. The law as enunicated by the Court of Appeals for the Sixth Circuit in *Wonderland Ventures, Inc., supra,* is that a franchise fee provision based upon some substantial percentage of gross receipts is uncon-

stitutional as an improper burden upon interstate commerce. Clearly, neither the Court of Appeals for the Sixth Circuit nor the FCC intended that the invalidity of certain franchise fee provisions should result in the wholesale invalidation of cable television franchises. However, unless this Court sets aside the action of the Kentucky Court of Appeals here in affirming the action of the City of Owensboro, it will be open to every municipality and regulatory agency in the states and cities of the country to invalidate CATV franchises and to frustrate the national policy established by the FCC.

II. The Judgment of the Kentucky Court of Appeals Results in a Deprivation of Petitioner's Property Without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States.

A franchise issued for any purpose by the state or any subdivision within the state, has long been recognized as property which the franchisee cannot be deprived of except by due process of law. *See, e.g., Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 142 (1938); *Conway* v. *Taylor,* 66 U. S. 603, *Crittenden County* v. *McConnell,* 237 Ky. 806, 36 S. W. 2d 627 (1931). Any state action which results in the loss to the Petitioner of its franchise rights without a full consideration by a judicial body of each and every relevant fact must be considered state action which violates Petitioner's right to due process under the Fourteenth Amendment. The judgment of the Kentucky Court of Appeals, declaring the Petitioner's franchise to be void, was made without

any consideration of the intent of the parties, as expressed in the Agreement, or the stated national policy favoring the constant availability of cable television service to the public. As a result, the Court's action was arbitrary and capricious, resulting in a deprivation of Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Kentucky Court of Appeals absolutely refused to consider the fact that the Franchise Agreement contained a severability clause which expressly provided that should any provision of the Franchise Agreement be held invalid, "such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid" (Appendix, p. 33). While the Court of Appeals recognized the existence of that provision, that Court completely failed to grant any weight to the expressed intention of the parties, as stated in the severability clause.

Furthermore, severability was not only the expressed intention of the parties, but it is also an essential part of the national policy concerning cable television franchises, as enunciated by the Commission. In a Letter Ruling, dated August 22, 1972, and entitled "Franchise Provisions At Variance with FCC Cable Television Rules" (see Appendix, p. 39), the Commission stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

This statement of policy by the Commission, brought to the Court of Appeals' attention in Petitioner's Petition for Rehearing, was intended to facilitate the continuation of cable television service in situations such as the one presented here. Yet that national policy, as well as the expenditure by Petitioner of an amount in excess of $430,000.00 to provide the residents of Owensboro with cable television service was totally ignored by the Kentucky Court of Appeals.

The Court of Appeals' refusal to consider the stated national policy concerning cable television franchise agreements and the expressed intention of the parties regarding the severability of provisions within the Franchise Agreement, was arbitrary and capricious, and its judgment amounts to a deprivation of Petitioner's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

DAVIESS CIRCUIT COURT

DIVISION II

Civil Action No. 13298

TOP VISION CABLE CO. OF KY., a Kentucky Corporation - - - - - - - - *Plaintiff*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner and
ALTON PUCKETT, Commissioner - - - *Defendants*

JUDGMENT

This cause having come on for hearing this 6th day of April, 1971, upon the motion of the defendants to dismiss and the motion of the plaintiff for Summary Judgment; the Court having considered the pleadings, exhibits, memoranda and argument of counsel, and the Court being advised, it is hereby

ORDERED: (1) The defendants' motion to dismiss be, and hereby is, OVERRULED.

(2) That the plaintiff's motion for Summary Judgment be, and hereby is, SUSTAINED as follows:

1. That Paragraph 2 of the agreement of December 17, 1965, by and between the City of Owensboro, Kentucky, and Top Vision Cable Co., Inc. of Ky. be, and hereby is, found severable from the remainder of the agreement and

the remainder of the agreement be and hereby is declared valid.

2. That the plaintiff and the defendants be, and hereby are, directed to renegotiate the payment provisions of Paragraph 2 of the aforesaid agreement of December 17, 1965, to arrive at a reasonable and fair sum based upon the privileges granted and the burdens imposed or likely to be imposed under the aforesaid agreement upon the public ways of the City of Owensboro, Kentucky.

3. That the defendants grant unto the plaintiff a reasonable period of time within which to complete construction of the CATV system provided for under the aforesaid agreement of December 17, 1965.

4. That the defendants be and hereby are permanently enjoined and prohibited from soliciting or considering bids or granting a franchise for a CATV operation within the City of Owensboro to any party within the period of such reasonable time for completion of construction of the CATV system as shall be agreed to pursuant to 3 above.

5. The plaintiff shall be, and hereby is, denied the right to recover fees heretofore paid to the City of Owensboro pursuant to the agreement of December 17, 1965.

THE COMMONWEALTH OF KENTUCKY

The Court of Appeals

Fall Term—September 22, 1972

Top Vision Cable Co. of Ky., A Ky. Corp.

v.

City of Owensboro, Ky., Etc., Et Al.

} Appeal from a judgment of the Daviess Circuit Court

MANDATE—Issued December 15, 1972

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

It is further considered that the cross-appellant recover of the cross-appellee its cost herein expended.

(s) Frances Jones Mills
C. A. A.

COURT OF APPEALS OF KENTUCKY

RENDERED: SEPTEMBER 22, 1972

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, Et Al. - - - - - - - - - *Appellants*

v.

TOP VISION CABLE COMPANY OF KENTUCKY, a Kentucky Corporation - - - - - *Appellee*

AND

TOP VISION CABLE COMPANY OF KENTUCKY, a Kentucky Corporation - - *Cross-Appellant*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, Et Al. - - - - - - - - *Cross-Appellees*

Consolidated Appeals from Daviess Circuit Court
Division II
Honorable Dan M. Griffith, Judge

OPINION OF THE COURT BY COMMISSIONER GARDNER—REVERSING

The City of Owensboro advertised for bids for a franchise to provide the citizens with community antenna television service (CATV). Top Vision Cable Company of Kentucky was granted the franchise. Pertinent provisions of the franchise agreement were as follows:

The effective date was December 17, 1965, with the grantees' having the privilege of continuing for 15 years.

Top Vision was granted the right to use the public ways of the city necessary for proper installation and maintenance of the system and also the city granted Top Vision the right, insofar as it could, to use poles and equipment of other utility companies within the city.

Construction was to be completed within two years. If not completed within two years the franchise was to become null and void. The city, in its discretion, could "extend said two (2) year deadline from time to time upon written application for same by the second party. * * *"

Top Vision was to provide coverage of all telecasts originating within a 40-air-mile radius of Owensboro.

Top Vision was to pay the city a sum equal to 26 percent of the gross income from the business within the City of Owensboro.

If any provision of the franchise agreement was declared invalid, such declaration would not affect the remainder of the franchise.

Soon after the franchise was granted the Federal Communications Commission promulgated a rule prohibiting the importation of distant television signals into the top 100 television markets. Owensboro is located in one of the 100 largest markets, to wit, the Evansville, Indiana, market. Enforcement of the rule would prevent Top Vision from picking up television signals from Louisville, Nashville, Bowling Green and Paducah. While the franchise agreement required that Top Vision supply coverage of telecasts originating from transmitters located only within a 40-mile radius of Owensboro, it was alleged by Top Vision and seems to have been acknowledged by the city, as shown by subsequent events, that it was anticipated by both parties that a wider coverage would be supplied. Top Vision alleged that the FCC rule was such a disappointment to prospective customers that many refused to accept

Top Vision's service. This in turn, Top Vision claimed, made it more difficult to obtain capital to complete the work.

Before the initial two-year period expired Top Vision requested and was granted a 12-month extension of time (to December 20, 1968) in which to provide the service. The resolution authorizing the extension contained the provision, "* * * Whereas, the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission and deem said request for an extension of time to be reasonable; * * *." Near the end of the extended period Top Vision requested and was granted another extension to December 20, 1970. The resolution recited, "Whereas, the Board of Commissioners deem the unforeseen stringent regulation of the Federal Communications Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system with the City, * * *."

Top Vision states that the city actively participated in trying to obtain a waiver of the FCC rule; that city officials wrote letters in behalf of Top Vision to the FCC and one of the city commissioners made a personal appearance before the FCC on May 21, 1969, in an effort to get a waiver of the ruling.

On March 26, 1970, in the consolidated cases of Wonderland Ventures, Inc. v. City of Sandusky, etc., 423 F. 2d 548 (6th Cir.) (1970), cert. denied, 400 U. S. 824, the Court of Appeals for the Sixth Circuit held that the ordinance there in issue (similar to that contained in the present franchise) imposed a gross-receipts tax on CATV systems and was unconstitutional as a burden on interstate commerce in violation of the commerce clause of the United States Constitution. In the wake of that decision, Top Vision requested that it and the city "renegotiate" the amount to be

paid for the use of the public ways of the city. The city refused. Thereupon Top Vision instituted action in the federal court to have declared invalid the provision whereby it was to pay 26 percent of the gross receipts to the city. The city filed a pleading acknowledging the invalidity of the 26-percent provision and the suit was dismissed because no actual controversy existed. The order of dismissal was entered November 23, 1970.

On November 4, 1970, Top Vision made a written request to the city for the third extension. The request was denied by resolution dated November 6, 1970. The present action was instituted by Top Vision on December 19, 1970.

In its complaint Top Vision asked that it be declared that the city had no authority to require that local CATV operations be franchised by the city, and that it be declared that the city could not deny Top Vision the privilege of using the public right of ways upon payment of a reasonable fee. In the alternative Top Vision asked that it be declared that the 26-percent clause was severable and that the remainder of the franchise agreement be held valid with further declarations that Top Vision be required to pay only a reasonable sum for the use of the public ways, that Top Vision be given a reasonable time within which to complete the project, that the city refund the amounts paid under the 26-percent clause, and that the city be prohibited from advertising for the granting of another franchise during the pendency of the action.

The city's motion to dismiss the complaint was overruled. On the same day Top Vision moved for a summary judgment and on the same day the motion for summary judgment was sustained and judgment entered. The judgment made no mention of Top Vision's demand that it be declared that the city had no legislative authority to require CATV operations to be franchised. The judgment provided (1) that the 26-percent clause was severable and the remainder of the agreement was valid, (2) that the city

and Top Vision renegotiate and arrive at a reasonable amount to be paid for the use of the public ways, (3) that the city grant Top Vision a reasonable time in which to complete the project, (4) that the city be enjoined from soliciting or considering bids or granting an exclusive franchise for a CATV operation within the city, and (5) that Top Vision not recover the fees paid under the invalid 26-percent clause.

In the city's motion to vacate the judgment one of the grounds was that the judgment was entered without the city's having filed an answer. It is noted that the city waived notice of motion for summary judgment. The judgment recites that the cause was submitted upon motion of the city to dismiss the complaint and upon motion of Top Vision for summary judgment. The judgment also recites that the court "considered the pleadings, exhibits, memoranda and argument of counsel." CR 12.02 provides that when upon motion to dismiss because the pleading fails to state a claim matters outside the pleading are presented, the motion shall be treated as one for summary judgment. It is obvious that the court and the parties treated the kindred motions together and that the efforts of the prospective parties relative to the motion to dismiss were also relied on in the motion for a summary judgment. It was not until after the summary judgment had been entered that the city raised the point that it had not filed its answer.

An anomolous situation is presented where *both* parties contend that the franchise agreement is invalid. The city argues that since the 26-percent clause is an integral and vital provision of the franchise, and since the federal court, in effect, held the clause unconstitutional, the franchise agreement is invalid in its entirety. Top Vision on the other hand contends that the invalidity arose because the city had no constitutional or statutory authority in the first place to require a CATV business to be franchised.

Ordinarily where both parties argue that a contract is invalid the court would simply agree and enter an order to that effect. In the present instance, however, the reason for the invalidity would have an important effect on further proceedings. If the reason is as contended by the city, the city could readvertise for bids and grant a franchise to someone other than Top Vision. If Top Vision's contention is sound, then the furnishing of cable reception to the viewers would be on an open-market basis.

First we shall look at Top Vision's contention that the judgment was erroneous because it was predicated on the city's having authority to require a CATV business to be franchised. Section 163 of the Kentucky Constitution is as follows:

> "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

Section 164 of the Kentucky Constitution is as follows:

> "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the

same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

KRS 96.050 reads in part as follows:

"SECOND-CLASS CITY MAY REGULATE CONSTRUCTION AND OPERATION OF UTILITIES—The legislative body of any city of the second class may, by ordinance:

(1) Direct and control the laying and construction of railroad or street railway tracks, bridges, turnouts and switches, poles, wires, apparatus and appliances in the streets and alleys of the city, and the location of depot grounds within the city."

This court has ruled decisively that services other than those enumerated in section 163 of the Kentucky Constitution are subject to franchise. In the case of Ray v. City of Owensboro, Ky., 415 S. W. 2d 77 (1967), the right of the city to require a franchise for the operation of ambulance service was attacked. We said:

"It will be noted that section 163 deals with certain specific subjects, to-wit, street railway, gas, water, steam heating, telephone or electric light companies within a city or town. We do not believe the right granted cities by this section is today limited to these specific utilities. The purpose of the section was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those utilities enumerated, but applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered."

We have held the following projects to be subjects for franchise: Garbage collection, City of Bowling Green v. Davis, 313 Ky. 203, 230 S. W. 2d 909 (1950); automobile-bus line operating over streets, People's Transit Co. v. Louisville Railway, 220 Ky. 728, 295 S. W. 1055 (1927); right to use a part of a river bed for the extraction of sand and gravel, Willis v. Boyd, 224 Ky. 732, 7 S. W. 2d 216 (1928).

It cannot be denied that television is an integral part of American life. It possesses many of the attributes of a public utility. It is of a public nature. It is said in 36 Am. Jur. 2d, Franchises, section 3, page 825:

> "Generally speaking, the right to carry on any business of a public nature, such as the establishment, construction, and operation of a public utility and the collection of tools or charges for its use or service, or the use of highways for such purpose, is a franchise."

Of rather recent vintage is the cable system. It is rapidly gaining in popularity. It enables the viewer to see a clearer picture. Especially is it desirable where the originating signal is far away. Stringent regulations of CATV by the FCC have been upheld by the Supreme Court of the United States. See United States v. Mid-West Video Corp., ___ U. S. ___, 92 S. Ct. 1860 (decided June 7, 1972). We cannot accept Top Vision's argument that the city is not involved because the cables and wires will be placed on poles and strung over public ways where existing utility companies have the right to operate by other franchises. It is not shown, in the first place, that all cables and wires will be constructed and used coincidentally with existing equipment of other utilities, and, in the second place, under its general obligation to provide its citizens with safe, clean and unobstructed public ways, the presence of television cables, even in connection with existing utilities, would be

an added burden on the city. We are of the opinion that the right to operate a community antenna television service in a city is a subject for franchise. We are also of the opinion that a franchise is an agreement between the granting authority and the holder and partakes of the usual incidents of a contract. See City of Louisville v. Louisville Home Telephone Co., 149 Ky. 234, 148 S. W. 13 (1912); Prestonsburg Water Co. v. Dingus, 271 Ky. 240, 111 S. W. 2d 661 (1937); City of Bowling Green v. Davis, 313 Ky. 203, 230 S. W. 2d 909 (1950); and 36 Am. Jur. 2d, Franchises, section 6, page 728.

The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the city, and the elimination of the clause vitiated the contract. This contention, we believe, is sound. It is true that the primary purpose of a public utility, including cable television, is to make available adequate service to the customers (Louisville Home Telephone Co. v. City of Louisville, 130 Ky. 611, 113 S. W. 855 (1908)) but also of importance is the remuneration to be received by the public authority. Both parties entered into the contract in good faith. On the strength of the contract Top Vision says it expended some $430,000. The city expected to receive 26 percent of the gross receipts. Since Top Vision was unwilling to pay the amount it agreed to, when it was determined the 26-percent clause was invalid, then the city was within its rights in declining to extend the franchise.

We are of the opinion, and the city concedes, that Top Vision is entitled to recover the equipment and materials it is using in connection with the project. The circuit court should determine and grant Top Vision a reasonable time to remove or sell the property.

Top Vision insists it is entitled to a refund of the amount paid to the city under the invalid 26-percent clause. The arguments of the respective sides have been well briefed. Top Vision argues that the rule in this jurisdiction is that money paid under a mistake of law may be recovered, citing Spalding v. City of Lebanon, 156 Ky. 37, 160 S. W. 751 (1913). The city counters by saying that since Top Vision has utilized the public ways it cannot recover the amounts paid for that privilege, citing Postal Telegraph Cable Co. v. City of Newport, 160 Ky. 244, 169 S. W. 700 (1914), and Bastin Telephone Co. v. Mount, 176 Ky. 26, 195 S. W. 112 (1917). Upon a remand of the case we believe the trial court should determine the question of remuneration to the city on the basis of what a reasonable fee would be for Top Vision's use of the city's public ways for the CATV service. If overpayment has been made then the excess should be refunded to Top Vision.

Since we have determined that the contract was invalid by virtue of the 26-percent clause we see no need to discuss another argument made by the city that Top Vision's failure to complete the project within the two years specified by the contract vitiated the contract nor Top Vision's counterargument that the city was estopped from insisting on the forfeiture.

Judgment is reversed and the case remanded for further proceedings consisting with this opinion.

Steinfeld, C.J., and Hill, Milliken, Osborne, Palmore, and Reed, JJ., concur.

Neikirk, J., concurs in result only.

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FRANCHISE AGREEMENT

This Franchise Agreement made and entered into on this the 17th day of December, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and TOP VISION CABLE COMPANY, INC. OF KENTUCKY, Party of the Second Part.

WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, uni-directional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to

otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to 26% of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses

and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint usage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any shall provide adequate facilities for maintenance of same. preference or advantage to any person or subject any per-

son to any prejudice or disadvantage, provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna television, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except these specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city,

agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other public ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bonds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, the party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date herof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the

party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any manner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

CITY OF OWENSBORO, KENTUCKY
By /s/ DUGAN BEST
Mayor

TOP VISION CABLE COMPANY, INC. OF KENTUCKY
By /s/ HAROLD R. SAGRAVES
Vice-President

Attest:

/s/ ADELLE SHELTON
City Clerk
(SEAL)

State of Kentucky }
City of Owensboro } Sct.

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

/s/ ADELLE SHELTON,
City Clerk

NEWS

Federal Communications Commission
1919 M. Street, N.W.
Washington, D. C. 20554
Public Notice

For information on releases and texts call 632-0002

87959

August 22, 1972—G

FRANCHISE PROVISIONS AT VARIANCE WITH FCC CABLE TELEVISION RULES

The following letter has been sent to Western Communications, Inc. by Sol Schildhause, Chief of the Cable Television Bureau, in response to an inquiry about the extent to which Federal-State/local franchising authorities can establish regulations which are different from those established by the FCC for cable television systems:

This is in reply to your letter of August 3, 1972, in which you question the extent to which franchising authorities can establish regulations in excess of or different than the regulations established by the Commission in the *Cable Television Report and Order.* I have taken the liberty of combining some of your questions and rephrasing others for purposes of clarity.

1. Q. May a franchising authority in a major television market specify a minimum channel capacity in excess of 20 channels?

   A. In footnote 25 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order,* the Commission stated that while it has preempted the area of channel capacity, it would not foreclose a system from meeting more stringent local requirements . . . *"upon a demonstration of need for such channel capacity and the system's ability to provide it."* (emphasis supplied) Also see paragraph 132 and footnote 70 of the *Cable Television Report and Order.*

2. Q. May a franchising authority outside a major market specify a minimum channel capacity and, if so, can this minimum channel capacity be in excess of what this Commission requires for a major market?

A. Cities outside major markets may specify a minimum channel capacity, but such capacity may not be in excess of what the Commisssion requires for systems in major markets. See Sections 76.251-(b) of the Rules and paragraph 148 of the *Cable Television Report and Order.*

3. Q. May a franchising authority located outside a major television market require a cable system to maintain a plant having the technical capacity for nonvoice return communications?

A. Yes—see Section 76.251(b) of the Commission's Rules and paragraphs 132 and 148 of the *Cable Television Report and Order.*

4. Q. May any franchising authority require a more sophisticated form of return communications?

A. In footnote 25 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* the Commission stated, "Where a franchising authority *has a plan for actual use* of a more sophisticated two-way capability and the cable operator can demonstrate its feasibility both practically and economically, we will consider, in the certificating process, allowing such equipment." (emphasis supplied)

5. Q. Can a franchising authority require all access services to be made available at no charge?

A. No—The Commission will consider in the certificating process, however, requirements that additional public access channels or some educational channels be offered at no charge or at reduced cost on an experimental basis. See paragraph 132 of the *Cable Television Report and Order.*

6. Q. Can a franchising authority require the franchisee to make available more access channels than those specified by the Commission?

A. No—unless during the certificating process the Commission is shown that such additional channels are necessary and capable of being used according to an existing, viable plan. See Section 76.251 (a)(11)(iv) of the Rules, and paragraph 132 of the *Cable Television Report and Order.*

7. Q. Can a franchising authority require a franchisee to provide access services outside major markets?

A. Yes—but to no greater extent than the Commission requires for systems in major markets. See Section 76.251(b) and paragraphs 132 and 148 of the *Cable Television Report and Order.*

8. Q. May a franchising authority impose a franchise fee based upon revenues derived from "auxiliary" services such as advertising revenues, leased channel revenues, pay cable revenues, etc.?

A. No—Subscriber revenues are considered to be those revenues derived from regular subscriber services—i.e., the carriage of broadcast signals and required non-broadcast services.

9. Q. May a franchising authority insist on a franchise fee higher than 3% if the excess fee is to be used for funding public access services?

A. There is no hard and fast answer to this question at present. Clearly, however, the factors that would bear heavily in the Commission's consideration of any such scheme would include the amount of excess fee, the danger that, through funding, local governments would control public access programming, and the possibility of other alternatives.

10. Q. May a franchising authority require a faster construction schedule than that suggested by the Commission?

A. Yes—See Section 76.31(a)(2) of the Commission's Rules.

11. Q. May a franchising authority require systems with fewer than 3500 subscribers to engage in local origination?

A. The Commission has preempted this field. See paragraph 48, First Report and Order, 20 FCC 2d 201, at 223. See also "Clarification of CATV First Report as to Scope of Federal Pre-emption," 20 FCC 2d 741. Under these circumstances, I believe the Commission would reject such a requirement. Further, the Commission preemption extends to policy concerning any waiver of the origination rule.

12. Q. May a franchising authority establish technical standards in excess of those required by the Commission?

A. Yes—(See paragraph 91 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*) The Commission will not, however, assume responsibility for enforcement of more stringent technical standards. Local authorities should therefore be prepared to assume the burden of such enforcement.

13. Q. May a franchising authority limit a franchisee to providing services that can be performed only by the franchisee itself?

A. No—Clearly the concept of access services is to offer the benefits of a multiplicity of channels to the public. Thus in Sections 76.251(a)(11) (i) and (iii), system operators are specifically forbidden to exercise control over the program content of public and leased access channels.

The foregoing responses to your questions should indicate the degrees to which the Commission will sanction franchise provisions at variance with its cable regulatory

program. Where variances are sought, as for instance where a franchise calls for extra access channels, greater channel capacity, or a higher franchise fee, detailed showings will be required during the certificating process. If such a showing is inadequate, the Commission will not issue a certificate of compliance.

It is recommended, therefore, that franchises be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendments. (Emphasis supplied.)

I hope the foregoing is responsive to your inquiry. If I can be of further assistance to you, do not hesitate to call on me.

COURT OF APPEALS OF KENTUCKY

File No. V-63-71

CITY OF OWENSBORO, KENTUCKY, ET AL. - *Appellants*

v.

TOP VISION CABLE CO. OF KY. - - - - *Appellee*

APPEAL FROM DAVIESS CIRCUIT COURT
SECOND DIVISION

PETITION OF APPELLEE FOR REHEARING

STATEMENT OF THE CASE

The Appellee, Top Vision Cable Co. of Ky., (hereinafter referred to as "Top Vision") is a corporation organized under the laws of the Commonwealth of Kentucky. The Appellant, City of Owensboro, Kentucky (hereinafter referred to as the "City"), is a municipal corporation of the State of Kentucky, and the Appellants, Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher, and Alton Puckett, are members of the Board of Commissioners of Owensboro, the governing body of the City.

On October 22, 1965, the City enacted Ordinance No. 63-65 (R. 17), which authorized the advertising for and the issuance of a CATV franchise within the City. Top Vision made a bid on the franchise, and on December 17, 1965, the City, through its Board of Commissioners, adopted a resolution confirming the issuance of a CATV franchise to Top Vision and granting the franchise to Top Vision under the

terms of a Franchise Agreement, dated December 17, 1965 (R. 24). Under the terms of paragraph 2 of the Agreement (R. 24), Top Vision was obligated to pay the City an annual franchise fee for the privilege of operating the franchise, the fee being equal to 26% of the gross income received by Top Vision from its operation of the CATV system.

As the Court noted in its opinion, Top Vision almost immediately encountered unexpected, unforeseen and severe hardships, wholly beyond its control, in its attempt to complete the construction of the CATV system for the City. These hardships centered around the promulgation by the Federal Communications Commission (FCC) of a rule prohibiting the importation of distant television signals into the top one hundred (100) television markets. Owensboro is located in one of these one hundred largest television markets, the Evansville market.

The City recognized the severe hardship placed on Top Vision by the FCC ruling, and recognized that the FCC rule prohibited the City from achieving its purpose in granting the franchise, to enable the citizens of Owensboro to receive distant television signals within the City. Twice the City granted Top Vision extensions of time in which to complete the CATV system for the expressed purpose of allowing Top Vision to go before the FCC "in an effort to relieve the CATV system in the City of Owensboro from the operation of certain restrictive regulations of said Commission. . . ." (Resolution No. 66-68, granting extension of time for construction of CATV system, R. 36), and City officials wrote letters and made appearances before congressional committees and federal agencies in their attempts to aid Top Vision resolve the problem.

On March 26, 1970, the Court of Appeals for the Sixth Circuit held that ordinances imposing a gross receipts tax on CATV systems were unconstitutional as imposing a burden upon the proceeds from interstate commerce in violation of the Commerce Clause of the Constitution of the

United States. *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir., 1970). Due to the decision in *Wonderland, supra,* Top Vision attempted to renegotiate the license fee payment with the City on the basis of the cost to the City of the operation of the CATV system by Top Vision. The City unreasonably refused to renegotiate and has continued in its refusal to negotiate up to this point.

On September 22, 1970, Top Vision filed an action in the United States District Court for the Western District of Kentucky for a declaratory judgment against the same parties as are defendants in the instant case, asking that the 26% gross receipts provision of the Franchise Agreement be adjudged unconstitutional under the Commerce Clause of the United States Constitution, pursuant to the rule announced in *Wonderland, supra.* The defendants moved to dismiss that complaint, on the ground that they concurred in Top Vision's position that the 26% gross receipts license fee provision was unconstitutional. Shortly thereafter, the defendants moved to dismiss for lack of jurisdiction, basing their motion on "Resolution No. 56-70" (R. 28), which resolution officially conceded the constitutional invalidity of the 26% gross receipts provision. The federal court then dismissed the case for lack of jurisdiction, since there was no longer any "federal question" involved.

Despite the City's concession of the constitutional invalidity of the 26% gross receipts provision based upon the decision in *Wonderland,* it continued to demand payments under that franchise fee arrangement, now held and conceded to be unconstitutional. Top Vision has stopped making such payments pending the outcome of this action, but from 1965 through August 1970, it paid 26% of its gross revenue to the City pursuant to the illegal terms of the Franchise Agreement. Such payments amounted to over $9,500.00 illegally collected by the City.

This action was filed in the Daviess Circuit Court by Top Vision on December 19, 1970, asking for a declaratory judgment and injunctive relief against the City. Top Vision asked for a declaration that: (1) the City had no authority to require a CATV operation to be franchised; (2) that any charge for the use of the City's right-of-ways must be reasonably related to the cost to the City of such use; (3) that the 26% gross receipts fee provision in the Franchise Agreement, conceded to be unconstitutional, was severable from the remainder of the Agreement, which remains valid; (4) that Top Vision should be granted an additional and sufficient period of time in which to complete the construction of the CATV system. In addition, Top Vision asked the court: (1) to determine a reasonable fee for the use of the City's public right-of-ways; (2) to order the City to refund all monies received by the City pursuant to the unlawful and unconstitutional 26% gross receipts fee provision; and (3) to restrain the City and its officials from treating the Franchise Agreement as null and void and of no legal effect.

On April 6, 1971, the Daviess Circuit Court granted, in part, Top Vision's motion for summary judgment on the basis of the pleadings, the exhibits attached to the pleadings and the memoranda and argument of counsel (R. 39). The court held that paragraph 2 of the Franchise Agreement, the invalid franchise fee provision, was severable from the remainder of the Agreement, which remained valid, and directed the City to renegotiate the payment provisions based upon the burdens imposed or likely to be imposed by the CATV system upon the public ways of the City. The court also granted Top Vision a reasonable time in which to complete construction of the system. In addition, the court held that a CATV system was a suitable subject for a franchise granted by a municipality in Kentucky, and denied Top Vision the right to recover any of the illegal

fees theretofore paid to the City under the terms of paragraph 2 of the Franchise Agreement.

The City appealed from the decision of the Daviess Circuit Court in regard to all its holdings, with the exception of its decision that the municipality had the authority to regulate a CATV business operation by franchise, and its holding that Top Vision was not entitled to a refund of the money paid to the City under the unlawful and unconstitutional fee provision of the Franchise Agreement. Top Vision cross-appealed from these latter decisions of the trial court. The appeal and cross-appeal were consolidated, and on September 22, 1972, this Court rendered judgment reversing the Daviess Circuit Court by ruling that: (1) a CATV business operation was a suitable subject for franchising under the laws of Kentucky; (2) the illegal franchise fee provision in the Franchise Agreement could not be severed from the Agreement, and the invalidity of the fee provision vitiated the entire contract; and (3) Top Vision was entitled to recover the fees previously paid to the City which were illegal and unconstitutional.

ARGUMENT

I. The Court Failed to Give Adequate Consideration to the Expressed Intention of the Parties Regarding the Severability of the Gross Receipts Fee Provision From the Remainder of the Franchise Agreement.

In its opinion, this Court recognized that the Franchise Agreement expressly provided that "[i]f any provision of the franchise agreement was declared invalid, such declaration would not affect the remainder of the franchise." (p. 2) But in its later analysis of the severability of the fee provision, the Court completely failed to give any consideration whatsoever to the expressed intention of the parties that should any provision of the Agreement be held

invalid by a court of competent jurisdiction, as was the case here, "such invalidity shall not affect the validity of this grant as a whole, or any part thereof, other than the part declared invalid." (Paragraph 16 of the Franchise Agreement, R. 21)

Whether a contract clause may be severed from the remainder of the contract without affecting the validity of that contract as a whole "involves the ascertainment of the intention of the parties, *which must be deduced from the contract itself.*" *Koppers Co.* v. *Asher Coal Min. Co.*, 226 Ky. 492, 11 S. W. 2d 114, 115 (1928) (Emphasis supplied); *see also, J. S. McHargue* v. *Scott*, Ky., 305 S. W. 2d 929 (1957).

The Court totally disregarded the parties' expressed statement as to the severability of any clause within the Franchise Agreement. Instead, the Court accepted the City's unsupported contention, based on absolutely no evidence whatsoever in the record, that one of the primary purposes of the franchise was to provide revenue to the City, and that the fee provision could not be severed without doing violence to this purpose. By accepting this unsubstantiated statement, the Citur totally disregarded the expressed intention of the parties, as it appeared on the face of the Agreement. There was absolutely no evidence to contradict the clear intention of the parties, as expressed by the contract itself.

Furthermore, in its opinion the Court cited with approval the case of *Ray* v. *City of Owensboro*, Ky., 415 S. W. 2d 77 (1967). As the Court noted, that case, as well as several others, stands for the proposition that "the purpose of the section (Section 163 of the Constitution) was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants." 415 S. W. 2d at 79. There is nothing to indicate that the authority to issue franchises was bestowed on municipalities for any purpose related to the raising of revenue.

> What, therefore, is commonly termed the "granting" of a franchise by a city for one of these public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. . . . *From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the services of such utilities, is not the revenue to be obtained for the city, but the securing of good and efficient service. . . . Louisville Home Telephone Co.* v. *City of Louisville,* 113 S. W. 855, 861 (1908). (Emphasis supplied)

It is clear that Sections 163 and 164 of the Constitution were enacted solely for the purpose of allowing the City to provide certain essential services to its inhabitants, and not to provide additional sources of revenue for a municipality. The City's statement to the contrary is not only totally unsupported by the evidence, but it also has no basis in law.

II. The Court Failed to Recognize the Preemption by the Federal Communications Commission of the Question of Franchise Fees for CATV Systems.

Clearly, the erroneous application of Kentucky law to the severability issue, by itself, requires revision of the Court's September 22, 1972 decision.

Perhaps of more serious consequence, however, is the chaos posed for CATV throughout Kentucky by this decision. Chaos, because the decision presumptively invalidates most existing CATV franchises in Kentucky and flies in the face of the preemptive regulation of the franchise aspects of CATV by the United States through the Federal Communications Commission. It must be pointed out to the Court that while the City has made the unsubstantiated allegation that one of its primary purposes in entering into

the Franchise Agreement was to provide revenue for the City, as a result of these FCC regulations, it is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes.

In the light of several court decisions regarding the constitutionality of gross receipts CATV franchise fees, including *Wonderland Ventures, Inc.* v. *City of Sandusky, supra,* the Federal Communications Commission acted to resolve the issue of what is to be considered an acceptable fee for the grant of a CATV franchise. By so acting this federal regulatory agency preempted the right of a state or local governmental body to negotiate or demand a fee in excess of a small percentage charge in exchange for the right to operate a CATV system.

As of March 31, 1972, the FCC Rules and Regulations dealing with cable television franchises demand that

> [t]he franchise fee must be reasonable (e.g., in the range of 3-5% of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). P & F RADIO REG. ¶ 85.31 (March 31, 1972)

Simply stated, the federal regulations are such that there is no longer any room for negotiation regarding a fee to be charged by a municipality for a CATV franchise; the FCC's rules are controlling.

The Court failed to recognize and to consider the effect of the FCC's preemption of this area of the law dealing with CATV franchises. The Court's decision that the invalidity of the franchise fee provision invalidated the Franchise Agreement is equivalent to a decision that these new FCC rules and regulations pertaining to franchise fees result in the invalidation of every franchise agreement in Kentucky where the franchise provisions are not in con-

formity with the FCC rules. Surely this is not the intention of this Court.

It is a long and well recognized rule that a contract containing an illegal provision is not void as a whole unless the legislative or regulatory body enacting the law demonstrates an *intention* to invalidate such contracts as a whole.

> A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal. See, e.g., McCullough Transfer Co. v. Virginia Sur. Co., 213 F. 2d 440 (6th Cir., 1954); Macco Const. Co. v. Farr, 137 F. 2d 52 (9th Cir. 1943); Guffey-Gillespie Oil Co. v. Wright, 281 F. 787 (8th Cir., 1922); Talco Capital Corp. v. Canaveral Int'l. Corp., 225 F. Supp. 1007 (S. D. Fla. 1964); 17 C.J.S. Contracts § 202 at p. 1007 (1963). Otherwise . . . the contract itself remains in full force and effect.
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> *Ets-Hokin & Galvin, Inc.* v. *Maas Transport Inc.*, 380 F. 2d 258, 260 (8th Cir., 1967).

The Court simply failed to consider that by the enactment of the above mentioned rules and regulations, the FCC preempted any right the City might have had to raise revenue by the use of such a CATV franchise.

The FCC's purpose to be served by the enactment of these rules and regulations was to "open up cable's potential to the public," *Proposals For Regulation of Cable Television Submitted to Congress by The Federal Communications Commission* (August 5, 1971) not to invalidate all franchises which do not conform to the rules. The FCC reemphasized this purpose in a Letter Ruling, dated August 22, 1972, entitled "Franchise Provisions At Variance With FCC Cable Television Rules," (See Appendix "A") in which it stated

> that franchises (should) be drawn to include severability clauses that will enable the Commission to authorize system operations without the delay that might be created by the necessity for franchise amendment.

The Franchise Agreement in question here has such a severability clause, yet the Court's decision contradicts not only the intention of the parties in this regard, but the stated position of the FCC as well.

The FCC, under its rule making authority, has deprived the City of any authority to raise revenue by the use of CATV franchises. By such action, the FCC did not intend to jeopardize the franchises of every CATV operator. But the Court's decision, as it now stands, does jeopardize every CATV franchise in the state of Kentucky which does not conform to the rules and regulations of the Federal Communications Commission. It is respectfully submitted that the Court failed to adequately consider the vast implications of its decision upon all the holders of CATV franchises in Kentucky, and that such a consideration is essential to a proper decision in this case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of this Court reversing the decision of the Daviess Circuit Court is in error and said decision should be reconsidered.

Respectfully submitted,

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